Access Denied! The Case for Extending Full First Amendment Protection to Proxy Speech Under *Citizens United*

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I. INTRODUCTION

A publicly traded corporation wishes to spend funds to publicize its views against a proposed constitutional amendment imposing a graduated personal income tax.[1] The majority of the company's board of directors believes that the proposed amendment would adversely affect earnings by shrinking the disposable income of individuals available for the purchase of the company's products. Silencing the corporation's intended speech is a criminal statute prohibiting corporations from making expenditures designed to influence the vote on any question submitted to voters by referendum. The company files suit, seeking to have the statute declared unconstitutional under the First Amendment. The result, though controversial, is hardly unexpected. Citing *Citizens United v. FEC*, the

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[1] This hypothetical is based on *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (striking down a state-law prohibition on corporate independent expenditures related to referenda issues).

court strikes down the statute because it impermissibly "suppress[es] political speech on the basis of the speaker's corporate identity."[2]

Now imagine an internal corporate struggle over the advisability of opposing the same tax legislation.[3] An insurgent group of shareholders wants to elect a new group of directors who will support the proposed amendment. This group believes that the current board's predictions regarding reduced earnings are too shortsighted; that is, it maintains that a graduated rate would stimulate the state's economy by offering tax relief to poor and middle-class families, leading to increased revenue in the long run. At this point, the group entertains its options. First, it considers waging a proxy contest.[4] Daunted by the sheer expense of conducting the contested election, the group quickly decides against this route.[5] In this regard, another path is more appealing. Acting under the authority of Securities and Exchange Commission (SEC or the Commission) Rule 14a-11, the group obligates the company to include, at the company's expense, its own nominees in the company's proxy card.[6] The insurgents also force the company to bear the cost of distributing a 500-word statement explaining why the other shareholders should vote for their nominees instead of the company's nominees.[7]

Furious, the company files suit, seeking to have Rule 14a-11 declared unconstitutional under the First Amendment. This time, however, the company loses. The court agrees with the SEC that proxy speech is commercial speech, and hence subject to limited First Amendment protection. The economic motivation behind the speech—that is, the sense that the company's opposition to the proposed amendment concerns not so much tax policy as its own bottom line—suddenly justifies a burden on the company's freedom of expression. The

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[2] 130 S. Ct. 876, 913 (2010). In *Citizens United*, the Supreme Court invalidated on First Amendment grounds 2 U.S.C. § 441b (2006), which had barred independent corporate expenditures for electioneering communications. *Id.*

[3] For the inspiration behind this hypothetical, see NICHOLAS WOLFSON, CORPORATE FIRST AMENDMENT RIGHTS AND THE SEC 128 (1990).

[4] A proxy contest is a "struggle between two corporate factions to obtain the votes of uncommitted shareholders," usually occurring "when a group of dissident shareholders mounts a battle against the corporation's managers." BLACK'S LAW DICTIONARY 1346 (9th ed. 2009).

[5] Proxy contests can cost anywhere from about $30,000 to $9 million. Marcel Kahan & Edward Rock, *The Insignificance of Proxy Access*, 97 VA. L. REV. 1347, 1384 (2011).

[6] *See* Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668, 56,782 (Sept. 16, 2010) (codified at 17 C.F.R. § 240.14a-11, *vacated by* Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011)).

[7] *See id.* at 56,785 (codified at 17 C.F.R. § 240.14a-11) (vacated).

insurgents go on to defeat the incumbents—and expend funds in the opposite political direction.

Proxy access is the right of certain shareholders in publicly traded corporations to have their nominees to the corporate board included in the company's proxy statement.[8] A highly controversial issue, proxy access has long engendered fierce debate in the corporate governance realm.[9] Much of the argument has revolved around whether proxy access is a good policy choice.[10] Surprisingly, however, few commentators argue against proxy access on free speech grounds.[11] This Note focuses on the neglected question: the constitutionality of proxy access under the First Amendment.

In 2011, the D.C. Circuit had the opportunity to consider whether the SEC's proxy access rule, Rule 14a-11, violates a corporation's First Amendment rights.[12] Yet, the court never reached the issue, for it struck down the rule on administrative law grounds.[13] The D.C. Circuit's decision is one of classic constitutional avoidance that follows the lead of the Supreme Court, which itself has managed to dodge the difficult question of whether, and to what extent, the First Amendment covers speech affected by securities regulations.[14] One commentator's colorful analysis perhaps best explains the Court's hesitation: avoiding the question forestalls the "impending jurisprudential train wreck" between the commercial speech doctrine on one side and the full protection afforded corporate political speech in *Citizens United* on the other.[15]

The constitutionality of proxy access is an unavoidable question. The SEC is committed to satisfying administrative law's "arbitrary and

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[8] *See* Kahan & Rock, *supra* note 5, at 1349.

[9] *Id.* at 1349–50.

[10] For a discussion of the policy arguments on both sides, see Steven M. Davidoff, *The Heated Debate Over Proxy Access*, N.Y. TIMES DEALBOOK (Nov. 2, 2010, 4:04 PM), http://dealbook.nytimes.com/2010/11/02/the-heated-debate-over-proxy-access/.

[11] Professor Larry Ribstein has suggested that *Citizens United* calls into question the constitutionality of "securities law provisions constraining truthful speech," including SEC Rule 14a-11. Larry E. Ribstein, *The First Amendment and Corporate Governance*, 27 GA. ST. U. L. REV. 1019, 1053 (2011).

[12] Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

[13] The D.C. Circuit held that Rule 14a-11 was "arbitrary and capricious" due to the SEC's failure to adequately assess its economic effects. *Id.* at 1155–56.

[14] *See* Nike, Inc. v. Kasky, 539 U.S. 654, 655 (2003) (per curiam) (dismissing certiorari as "improvidently granted" in a case that might have resolved the tension between corporate speech and the First Amendment); Lowe v. SEC, 472 U.S. 181, 211 (1985) (resolving a challenge to the Investment Advisers Act of 1940 on narrow statutory interpretation rather than First Amendment grounds).

[15] Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613, 616 (2006).

capricious" standard,[16] and when it does, the court will have no alternative but to resolve the open First Amendment issue. In the unlikely event that the SEC decides not to go back to the drawing board, however, its current alternative to mandatory proxy access—shareholder access proposals under Rule 14a-8—remains equally problematic under the First Amendment.[17]

While the First Amendment issue is thus unavoidable, the collision courts and commentators have so vividly imagined is. In the context of corporate proxy speech in particular, and perhaps even in the realm of corporate governance speech in general, applying First Amendment principles to the SEC's rules produces not cacophony but harmony. As our hypothetical dispute illustrates, government power over internal proxy speech leads to government influence over the corporation's external expression. If the First Amendment fully protects the latter, there is no principled reason why the former should be afforded less constitutional protection under the label of commercial speech. With this approach, political and commercial speech remain two separate tracks, and the SEC continues to regulate technical financial disclosures unfettered by First Amendment concerns.[18]

In light of the Supreme Court's decision in *Citizens United*, both Rules 14a-11 and 14a-8 violate the First Amendment. Proxy speech is fully protected political expression, and the SEC cannot put forth a compelling government interest to justify regulating it.

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[16] *See infra* note 27 and accompanying text.

[17] *See* 17 C.F.R. § 240.14a-8(i) (2010) (requiring management to include a shareholder-initiated proposal in a corporation's proxy statement whenever the proposal is a proper matter for consideration under the laws of the state of incorporation). A proposal is not a proper matter for consideration, and may be excluded, if it deals exclusively with the issuer's ordinary business operations. *See* THOMAS LEE HAZEN, PRINCIPLES OF SECURITIES REGULATION 215–16 (2d ed. 2006). However, a proposal in furtherance of a "significant social policy issue[]" cannot be excluded. Final Rule: Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018 (May 21, 1998) [hereinafter Final Rule], *available at* http://www.sec.gov/rules/final/34-40018.htm.

[18] While this Note demonstrates that proxy-related speech is political expression and that proxy access is thus unconstitutional even under the current commercial speech doctrine, it concludes by arguing that the fight over proxy access may prove to be the first step in overturning the commercial speech doctrine altogether. *See infra* Part V.

II. INFILTRATING THE CORPORATE BALLOT: TWO POINTS OF ACCESS

The proxy process is the primary method by which shareholders of a publicly traded corporation elect the board of directors.[19] Incumbent directors typically nominate a candidate for each vacancy before the election, which takes place at the company's annual meeting.[20] Prior to the meeting, the company distributes to all shareholders a set of proxy materials that includes information about each nominee.[21] If a shareholder wishes to nominate a different candidate, she may initiate a proxy contest by filing her own proxy statement and soliciting votes from her fellow shareholders.[22]

The proxy access rules provide shareholders an alternative—and more appealing—procedure for nominating directors. Designed to encourage boards to be more responsive to shareholders and more vigilant in their oversight of companies in the wake of the recent financial crisis, the rules open the corporate ballot to shareholder nominees in two different ways.[23] First, Rule 14a-11—the so-called "Shareholder Access Rule"—generally grants long-term shareholders with a significant stake in the company the power to place their own director candidates on the corporate ballot.[24] Second, Rule 14a-8, which entitles shareholders to include certain proposals in the company's proxy materials, permits shareholders to propose bylaw amendments establishing proxy access for shareholders.[25] While the former mandates

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[19] James Hamilton, *D.C. Circuit Vacates SEC Proxy Access Rule as Arbitrary and Capricious*, WOLTERS KLUWER L. & BUS. BRIEFING 1 (July 2011), http://news.wolterskluwerlb.com/media/SpecialReport_Proxy-Access.pdf.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *See* WILLIAM T. ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 218 (3d ed. 2009).

[24] Specifically, shareholders must hold at least three percent of the company's shares for at least three years to use Rule 14a-11. *See* Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668, 56,782–83 (Sept. 16, 2010) (codified at 17 C.F.R. § 240.14a-11(b)(1)–(2)) (vacated). Shareholders cannot use the rule if they hold the company's securities with the intent of effecting a change of control of the company. *See id.* at 56,784 (codified at 17 C.F.R. § 240.14a-11(b)(6)) (vacated).

[25] Also known as "private ordering," proxy access on a company-by-company basis has a rather turbulent history. *See* Francis H. Byrd, *Proxy Access: Only the Beginning*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 30, 2011, 9:46 AM), http://blogs.law.harvard.edu/corpgov/2011/10/30/proxy-access-only-the beginning /#printable. In 2006, the Second Circuit first opened the door to proxy access on a company-by-company basis by holding that a company could not exclude, under Rule 14a-8(i)(8), proposals to amend the company's bylaws for the purpose of establishing a procedure for shareholders to nominate directors. *See* Am. Fed'n of State, Cnty. & Mun.

proxy access for all publicly traded corporations, the latter creates the possibility of proxy access on a company-by-company basis.

In July 2011, a unanimous panel of the Court of Appeals for the D.C. Circuit vacated Rule 14a-11, holding that the SEC was "arbitrary and capricious" in promulgating it.[26] The Court of Appeals' opinion, however, is unlikely to be the last word in the shareholder access movement for several reasons. First, while the SEC chose not to appeal the decision, it remains committed to facilitating shareholder access to the corporate ballot.[27] Given that the Commission first contemplated proxy access sixty years ago, and has since released several controversial proposals,[28] it is unlikely to drop its efforts on this front now. Second, and more importantly, the court's ruling concerned only one of two points of access to the corporate ballot. While the court temporarily eliminated Rule 14a-11's blanket grant of proxy access, it left untouched the rule allowing shareholders to submit proposals for proxy access at their individual companies.[29] As a result, multiple commentators have predicted a plethora of shareholder access proposals on a company-by-company basis for the upcoming proxy season.[30]

Emps. v. Am. Int'l Grp., Inc., 462 F.3d 121, 130–31 (2d Cir. 2006). Intending to reverse this holding, the SEC amended Rule 14a-8 a year later to allow corporations to exclude shareholder proposals "relating to an election for membership on the company's board" or relating to "a procedure for such nomination or election." ALLEN, *supra* note 23, at 219. When the SEC adopted Rule 14a-11 in 2009, it reversed course and simultaneously amended Rule 14a-8 to prevent companies from excluding such shareholder proposals from their proxy statements. *See* Hamilton, *supra* note 19, at 3.

[26] *See infra* notes 12–13 and accompanying text.

[27] *See* Press Release, SEC, Statement by SEC Chairman Mary L. Schapiro on Proxy Access Litigation (Sept. 6, 2011), *available at* http://www.sec.gov/news/press/2011/2011-179.htm (explaining that the SEC "remain[s] committed to finding a way to make it easier for shareholders to nominate candidates to corporate boards").

[28] *See* Kahan & Rock, *supra* note 5, at 1349. The predecessor to the recently vacated Rule 14a-11, promulgated in October 2003, solicited over 700 comment letters, more than any other SEC proposal in recent history. *See* ALLEN, *supra* note 23, at 218; Davidoff, *supra* note 10.

[29] *See* Hamilton, *supra* note 19, at 3.

[30] *See, e.g.*, Keith Paul Bishop, *The Imminent Resurrection of Rule 14a-8 and the Renewed Significance of State Corporate Law*, CAL. CORP. & SEC. L. (Sept. 12, 2011), http://calcorporatelaw.com/2011/09/the-imminent-resurrection-of-rule-14a-8-and-the-renewed-significance-of-state-corporate-law/; Broc Romanek, *Proxy Access: SEC Decides Not to Appeal—But Does Open "Private Ordering" Floodgates*, THECORPORATE COUNSEL.NET (Sept. 7, 2011), http://www.thecorporatecounsel.net/Blog/2011/09/the-secs-rethink-of-all-its-rules-not-a-joke.html (characterizing private ordering as a "nice boon for corporate lawyers" and signaling the trend toward company-by-company shareholder access proposals).

Finally, the D.C. Circuit's ruling hardly shuts the door on proxy access because the panel avoided one issue altogether: the interplay between proxy access and a corporation's First Amendment rights. In the battle of proxy access, the First Amendment is the business groups' most powerful weapon—if they can only learn how to use it.

The Business Roundtable and the Chamber of Commerce (the business groups) misfired on multiple accounts. First, they briefed the First Amendment issue to the D.C. Circuit in a way that would allow proxy access to continue on a company-by-company basis. Secondly, and relatedly, they failed altogether to recognize a more "direct route" to the First Amendment, the Supreme Court's landmark ruling in *Citizens United*, that justifies invalidating both Rules 14a-11 and 14a-8 on constitutional grounds.[31]

III. THE BUSINESS GROUPS' INCOMPLETE FIRST AMENDMENT CHALLENGE

The business groups contended that Rule 14a-11 violates the First Amendment by forcing publicly traded companies "to fund and carry campaign speech by third parties that is opposed by the company's duly elected board of directors."[32] To support this proposition, the brief relies on *Pacific Gas & Electric Co. v. Public Utilities Commission*,[33] in which the Supreme Court invalidated a state regulatory order requiring a utility to place a third-party newsletter in its customer billing envelopes.[34] Applying strict scrutiny, the plurality concluded that the Commission's access requirement improperly burdened the utility's "right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents."[35] As for Rule 14a-8, the business groups themselves urged the continued existence of proxy access on a company-by-company basis by contending that shareholder access proposals constitute a less restrictive means by which the government may achieve its purpose than a blanket rule.[36]

This line of attack on the constitutionality of proxy access falls short for several reasons. Clearly, closing one door to proxy access while

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[31] Larry Ribstein, *The Securities Laws and the First Amendment*, TRUTH ON THE MARKET (Dec. 28, 2010, 3:21 AM), http://truthonthemarket.com/2010/12/28/the-securities-laws-and-the-first-amendment/.

[32] Opening Brief of Petitioners Business Roundtable & Chamber of Commerce of the United States at 55, Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011) (No. 10-1305).

[33] *Id.* at 56.

[34] 475 U.S. 1, 4, 20–21 (1986) (plurality opinion).

[35] *Id.* at 14 (quoting Buckley v. Valeo, 424 U.S. 1, 49 & n.55 (1976)).

[36] Opening Brief of Petitioners, *supra* note 32, at 58.

personally holding the other wide open is poor strategy. Even worse, the precedent on which the business groups rely distinguishes "access" to corporate mailings and shareholder access to corporate proxies under Rule 14a-8, finding that the latter passes constitutional muster.[37] Thus, the very *reasoning* the business groups use to attack the constitutionality of mandatory proxy access reinforces the constitutional validity of shareholder access proposals under Rule 14a-8—the rule now serving as the preferred point of access to the corporate ballot after the D.C. Circuit's decision.[38]

Had they realized the strength of their weapon, however, the business groups might have aimed for an additional target. Indeed, *Citizens United*, the decision that so championed the First Amendment rights of corporations, justifies invalidating both Rules 14a-11 and 14a-8 on constitutional grounds, completely closing the corporate ballot to shareholder nominees.

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[37] A footnote in the *Pacific Gas* plurality opinion distinguishes the "access" to corporate mailings involved there from Rule 14a-8 proposals by maintaining that the rule "govern[s] speech by a corporation *to itself*" and therefore "do[es] not limit the range of information that the corporation may contribute to the public debate." 475 U.S. at 14 n.10. Responding specifically to the Business Roundtable's comment letter challenging the constitutionality of the proposed rulemaking, the SEC's final rule cites *Pacific Gas* for the proposition that Rule 14a-11 governs internal, rather than external, speech. *See* Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668, 56,674 n.61 (Sept. 16, 2010) (codified at 17 C.F.R. § 240.14a-11) (vacated). This Note demonstrates that this distinction is largely artificial given the relationship between a corporation's internal governance dialogue and the speech it contributes to the external political debate. *See infra* notes 55–56 and accompanying text.

[38] The inconsistency of the business groups' argument was not lost upon the D.C. Circuit. In an amicus brief filed in support of the SEC, several prominent law professors wrote:

> Petitioners offer no principled rationale for why the First Amendment should treat these two rules that require companies to include shareholder statements in proxy materials differently. Like Rule 14a-11, Rule 14a-8 requires a company, in certain circumstances, to include in its proxy statement material provided by shareholders, regardless of whether the company's board or management agrees with the shareholders' position.

Law Professors' Brief as Amici Curiae in Support of the SEC at 9, Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011) (No. 10-1305). While the professors recognize, as this Note proposes, that Rules 14a-11 and 14a-8 must either rise or fall together, they summarily dismiss the applicability of *Citizens United* on this outcome. *See id.* at 11 (maintaining, almost as an afterthought, that "[r]ule 14a-11 does not regulate 'core political speech' so as to implicate the concerns identified by the [*Citizens United*] Court"). This Note demonstrates that *Citizens United* justifies invalidating both Rules 14a-11 and 14a-8 on First Amendment grounds. *See infra* Part IV.B.

IV. THE IMPLICATIONS OF *CITIZENS UNITED* ON THE CONSTITUTIONALITY OF PROXY ACCESS

At this point, a crucial objection, and one the SEC proposed in response to the business groups' constitutional challenge, must be addressed.[39] *Citizens United*, after all, concerned corporate speech in connection with elections and comment on public affairs—in short, the political speech that lies "at the heart of the First Amendment's protection."[40] At first blush, proxy speech seems far removed from this sacred realm, relegated to a category of speech—commercial speech—that the courts historically have treated less favorably.[41]

The political nature of proxy-related statements, however, suggests that the SEC's proxy-access rules should be subject to strict scrutiny under the First Amendment. Both Rules 14a-11 and 14a-8 cannot satisfy this standard. The SEC's interest in regulating a corporation's proxy speech—to equalize the voices producing it—fails to rise to the level of a compelling government interest under *Citizens United*. Both rules must thus be struck down on constitutional grounds.

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[39] *See infra* note 44 and accompanying text.

[40] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985) (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978)).

[41] *See* Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1187 (1988) (arguing that commercial speech "is located at least some distance from the core or cores of the first amendment"). While political speech has enjoyed longstanding protection under the First Amendment, the Supreme Court did not extend First Amendment protection to a corporation's commercial speech until 1976. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 773 (1976). Four years later, the Court set out a four-factor, intermediate scrutiny test for assessing the constitutionality of laws affecting commercial speech. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980). Although the Court has continued to subject various restrictions on commercial speech to intermediate scrutiny, its recent decisions have indicated that even greater protection may be warranted under the First Amendment. *See* Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2659 (2011) (invaliding under "heightened judicial scrutiny" a Vermont law restricting the sale, disclosure, and use of pharmacy records revealing the prescribing practices of individual doctors); *see also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554 (2001) ("[S]everal Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases."); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 184 (1999) (raising the possibility that *Central Hudson* should be replaced with a more stringent test). Given this shift toward affording commercial speech greater protection under the First Amendment, applying strict scrutiny to regulation of corporate proxy speech—speech that is inherently political in nature—is a small step. *See infra* Part IV.A.

A. *The Applicability of* Citizens United *to SEC Regulation of Proxy Speech*

Citizens United established that under the First Amendment, "the Government may not suppress political speech on the basis of the speaker's corporate identity."[42] The SEC's proxy access rules violate this principle because they compel a corporation to alter the content of its proxy materials, which are inherently political as opposed to commercial communications.[43]

The SEC has maintained that regulation of proxy-related statements does not violate the First Amendment because such communications constitute commercial speech,[44] or speech relating "solely to the economic interests of the speaker and its audience."[45] The commercial speech label, however, is entirely inappropriate for proxy speech. Leaving aside for the moment the issue of economic interest, consider first that the goal of regulating commercial speech is to ensure the dissemination of truthful information forming the basis of product or share purchase decisions.[46] While the SEC can readily verify the truth or falsity of technical financial disclosures, which it also regulates under the

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[42] 130 S. Ct. 876, 913 (2010).

[43] First Amendment jurisprudence does not distinguish government regulations *suppressing* fully protected speech from those *compelling* it. *See* Riley v. Nat'l Fed'n of the Blind, Inc., 487 U.S. 781, 796–97 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say.").

[44] *See* Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668, 56,674 n.61 (Sept. 16, 2010) (codified at 17 C.F.R. § 240.14a-11) (vacated).

[45] *Cent. Hudson*, 447 U.S. at 561 (1980). This definition of commercial speech is but one of three that the Supreme Court has proposed. When it first extended First Amendment protection to commercial speech, the Court defined such expression as that "which does no more than propose a commercial transaction." *Va. State Bd. of Pharmacy*, 425 U.S. at 762 (internal quotation marks omitted). The Court has also stated that commercial speech has three characteristics, neither one of them dispositive: (1) it is an advertisement of some form; (2) it refers to a specific product; and (3) the speaker has an economic motivation for the speech. Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 66–67 (1983). The importance of economic motivation as a basis for relegating certain speech to less favorable First Amendment status, however, may have dwindled recently. *See Sorrell*, 131 S. Ct. at 2665 (rejecting the argument that economically motivated speech warrants less First Amendment protection by reasoning that "a great deal of vital expression" may result from an economic motive).

[46] *Cf. Cent. Hudson*, 447 U.S. at 593 (observing that "false and misleading commercial speech is not entitled to any First Amendment protection"); WOLFSON, *supra* note 3, at 122 ("[S]ome argue that the government can more easily distinguish truth from falsity in the area of commercial speech than in the area of political speech.").

label of commercial speech, proxy statements concern complex policy issues that do not lend themselves to this sort of review.[47]

Equally to the point, proxy statements concern more than a simple commodity—corporate stock—and shareholder decisions to hold or sell it. As one commentator has remarked, such statements "evoke larger questions of corporate policy and have implications for all corporate stakeholders including management, shareholders, employees, and the community at large."[48] Our hypothetical regarding the propriety of supporting certain tax legislation lends credence to this observation. The dispute concerned more than the economic interests of the incumbent board, the insurgents, and other shareholders; also at stake were the composition of the community and the disposable income of its members. To permit government interference in this debate under the guise of commercial speech regulation discounts the wider ramifications of corporate decision making.

Proxy-related statements constitute fully protected political speech because they concern a traditionally political process within the corporation that is only one step removed from the political decisions occurring outside of it. Proxy battles, like traditional political campaigns, are ultimately conflicts over control; the only difference is the subject of the power struggle.[49] Because political contributions and expenditures are management decisions—that is, they are decided by a vote of the board of directors and not subject to a shareholder vote[50]—the winner of a seat at the corporate board gains considerable influence into political decision making.[51] If, after *Citizens United*, corporations are to be "full-fledged participants in political debates,"[52] the First Amendment must fully protect both their external political speech and the internal governance process that shapes it.

Under the First Amendment, government attempts to regulate fully protected political speech are presumptively invalid unless they survive strict scrutiny; that is, the government must demonstrate that the regulation both furthers a compelling interest and is narrowly tailored to

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[47] *See* WOLFSON, *supra* note 3, at 123.

[48] Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in* Citizens United, 61 CASE W. RES. L. REV. 497, 546 (2011).

[49] WOLFSON, *supra* note 3, at 123.

[50] Tucker, *supra* note 48, at 530.

[51] One commentator has gone so far as to argue that "the ability to direct corporate decisions represents the ability to control political life." Michael R. Siebecker, *A New Discourse Theory of the Firm After* Citizens United, 79 GEO. WASH. L. REV. 161, 165 (2010).

[52] Ribstein, *supra* note 31.

achieve it.[53] Both Rules 14a-11 and 14a-8 cannot satisfy this stringent standard because they share the same fatal flaw: the government interest both rules serve—equalizing the voices of incumbent and insurgent—is the same one the *Citizens United* majority rejected.

B. *The Insurmountable First Amendment Hurdle to Proxy Access Under Rules 14a-11 and 14a-8*

Citizens United repudiated any government interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections."[54] In the words of one commentator, the Court characterized "the inherent unequal playing field in any marketplace, especially the marketplace of ideas, as a reality of our economic and political system . . . beyond the reach of our government to remedy."[55]

The "equalization-of-voices" argument that the Court rejected in *Citizens United*, however, is an integral part of Rules 14a-11 and 14a-8.[56] Rule 14a-11 dramatically lowers the cost of an election contest, opening the corporate ballot to an insurgent group of shareholders who would otherwise lack the funds to oppose the company's director nominees—and the corporate policies they support.[57] The rule not only alters the content of the proxy card, but also forces the company to publish, at its own expense, the competing views of the insurgents in the proxy statements.[58] An equivalent rule in the political realm is laughable; indeed, "a drastic reordering of constitutional policy" would be necessary before an impartial government arbiter could compel, for instance, a Congresswoman running for reelection to allocate space in her campaign speeches to her opponent's words.[59] When contests for both political and corporate office ultimately affect social policy, however, government interference in the latter should similarly strike our sensibilities.

In the same way, Rule 14a-8 levels the playing field between management and shareholders by compelling a corporation to carry at its own cost certain messages of dissident shareholders that it opposes. These shareholder proposals are not necessarily limited to commercial

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[53] *See* Citizens United v. FEC, 130 S. Ct. 876, 898 (2010).
[54] *Id.* at 904.
[55] Tucker, *supra* note 48, at 549.
[56] *Id.*
[57] *See supra* note 5 and accompanying text.
[58] *See supra* notes 6–7 and accompanying text.
[59] WOLFSON, *supra* note 3, at 129.

issues, but may—and have—concerned purely political ones.[60] Because the SEC does not permit corporations to exclude shareholder proposals in furtherance of "significant social policy" goals,[61] corporate boards have propagated, in spite of themselves, political and social messages such as proposals to cease the sale of napalm because of its use in the Vietnam War[62] and to end production of pâté de foie gras.[63]

Compelling corporations to speak on these issues, however, is entirely inconsistent with the Supreme Court's unwavering message that speech regarding matters of "public concern" is most deserving of First Amendment protection.[64] As the Court recently explained, speech touches upon matters of public concern "when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."[65] This definition clearly encompasses the content of shareholder proposals in furtherance of "significant social policy" goals. Because Rule 14a-8 regulates the content of a corporation's speech on matters of public concern, it is invalid under the First Amendment—and thus cannot serve as an alternative point of access to the corporate ballot.

Rules 14a-11 and 14a-8 thus fall together, plagued by the same fatal flaw that characterized restrictions on corporate spending in political campaigns. Under *Citizens United*, the government cannot equalize political speech between contesting groups of unequal resources without running afoul of the First Amendment. Permitting the SEC to regulate the content of the corporate proxy is but another path to the same pernicious result.

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[60] Justice Stevens has observed that Rule 14a-8 "cannot be justified on the basis of the commercial character of the communication, because the Rule can and has been used to propagate purely political proposals." *Pacific Gas & Electric Co. v. Pub. Utils. Comm.*, 475 U.S. 1, 39 n.8 (1986) (Stevens, J., dissenting).

[61] *See* Final Rule, *supra* note 17.

[62] *See* Med. Comm. for Human Rights v. SEC, 432 F.2d 659, 661 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

[63] *See* Lovenheim v. Iroquois Brands, Ltd., 618 F. Supp. 554, 556 (D.D.C. 1985).

[64] *See, e.g.*, Connick v. Myers, 461 U.S. 138, 145 (1983) ("[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.") (internal quotation marks omitted).

[65] Snyder v. Phelps, 131 S. Ct. 1207, 1216 (2011) (citation omitted) (internal quotation marks omitted).

V. CONCLUSION: WINNING THE BATTLE *AND* THE WAR

For business groups and other opponents of proxy access, vacating both Rules 14a-11 and 14a-8 on constitutional grounds would constitute an important victory, foreclosing the possibility of foisting shareholder nominees onto the corporate ballot. As the corporate ballot closes, however, a Pandora's box of First Amendment challenges will open regarding a larger issue: the impact of *Citizens United* on the continued viability of the commercial speech doctrine.

For those who have argued for years that there can be no principled distinction between commercial and political speech, extending First Amendment protection to proxy speech under *Citizens United* is but the first battle in a long war. It is the easiest fight to wage first because of all the corporate governance speech that the SEC regulates as commercial expression, proxy statements bear the greatest resemblance to conventional political speech. Rules 14a-11 and 14a-8 occupy adjacent battlefields, and one powerful weapon easily strikes them both down. Though the extent of the damage may now be unclear, the careful observer would do well to turn her gaze from the waves of corporate money flooding American elections to the steady dripping that could one day erode an established point of First Amendment jurisprudence.